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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1941.

No. 320.

SOUTHERN STEAMSHIP COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

NATIONAL MARITIME UNION OF AMERICA,
Intervening Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

This case comes before the Court on writ of certiorari issued to review a final decree of the United States Circuit Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The findings of fact, conclusions of law and order of the National Labor Relations Board, filed on April 22, 1940, (R. 17-44) are reported in 23 N. L. R. B. No. 2.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, written by Circuit Judge

Maris, and concurred in by Circuit Judges Biggs, Jones and Goodrich (R. 769) with a dissent written by Circuit Judge Clark (R. 780) was filed on May 6, 1941, and is reported in *Southern Steamship Company v. National Labor Relations Board,* 120 F. (2d) 505.

JURISDICTION.

The jurisdiction of this Court to review the final decree of the Circuit Court of Appeals for the Third Circuit on a writ of certiorari is provided by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 299, § 1, 43 Stat. 938 (28 U. S. C. A. Section 347 (a)) and Section 10 (e) and (f) of the National Labor Relations Act, July 5, 1935, c. 372, § 10, 49 Stat. 453 (29 U. S. C. A. Section 160 (e) and (f)).

The final decree of the United States Circuit Court of Appeals for the Third Circuit was entered May 20, 1941 (R. 786). Petition for writ of certiorari was granted by this Court on October 13, 1941 (R. 792).

STATEMENT OF THE CASE.

The National Labor Relations Board instituted proceedings under the National Labor Relations Act against the petitioner, Southern Steamship Company, charging that petitioner had unlawfully terminated the employment of five members of the crew of the *SS. City of Fort Worth* and that petitioner had refused to bargain with the National Maritime Union of America [1] (hereinafter called "N. M.

[1] The National Maritime Union of America was permitted to intervene as a party to the proceedings in the United States Circuit Court of Appeals by order entered September 16, 1940. (R. 767.)

U.") after its certification by the Board. After hearing, the Board ordered Southern Steamship Company to reinstate with back pay the said five members of the crew and also six other members of the crew who had gone on a "sympathy" strike as a result of said termination and further ordered the petitioner to bargain collectively with the N. M. U. This order was affirmed by the United States Circuit Court of Appeals for the Third Circuit, and a decree enforcing the order was entered by said Court (R. 769, 786).

The petitioner has maintained and still maintains that:

(a) The seamen involved in this proceeding did not have the right to engage in a strike on board the *SS. City of Fort Worth* when she was moored to the dock at Houston, Texas, during her coastwise voyage from Philadelphia because they were seamen and also because they were under Shipping Articles; hence the failure to rehire the seamen engaged in said strike did not amount to an unfair labor practice within the meaning of the National Labor Relations Act;

(b) Irrespective of the strike by said seamen, their tenure of employment terminated when they "signed off" at the expiration of their Shipping Articles, and petitioner was not required to reëmploy them;

(c) The certification of N. M. U. was invalid because representatives of the petitioner had not been permitted to be present at the election, and petitioner was justified in refusing to bargain with said organization.

The controversy in this proceeding concerns voyage No. 201 of the *SS. City of Fort Worth* from Philadelphia, its home port, to Houston and return. On June 30, 1938, the crew signed Shipping Articles at Philadelphia, the home

port, before the local United States Shipping Commissioner, wherein, *inter alia,* they agreed "to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of said Master . . . and of their superior officers, in everything relating to the vessel . . ." (R. 681.)

The vessel sailed on July 1, 1938, with said crew. In the course of its voyage, while the *SS. City of Fort Worth* was docked at Houston, not its home port, thirteen members of the crew held a meeting on shore on Sunday, July 17, 1938. They claimed that they had previously requested a bargaining conference and also passes for the union delegates to board the ships while in port, and, having been informed that nothing had been accomplished concerning a bargaining conference or the securing of passes, they decided to strike for union recognition (R. 23, 129).

On the next day, Monday, July 18, 1938, the strike was started at 8 o'clock a. m. Tracey, an oiler, failed to turn the steam on deck and refused to obey the command of Paul,[2] the First Assistant Engineer, to do so. When Paul then stated he would put the steam on deck himself, Tracey stated that he would "take the firemen out of the fire room" (R. 23, 132). Paul then turned the steam on, and Tracey called Braun, a fireman, to put the "fires out". Braun thereupon "threw his pumps and came out." (R. 23, 133.) When Robinson, the Second Engineer, told Tracey that he would put the steam on deck himself, Tracey said that there would be no steam after eight o'clock (R. 355).

Ferguson, a fireman who relieved Braun at eight o'clock, refused to tend the fires, and joined the other strikers who were seated on the poop deck.

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[2] Misnamed "Pool" in various instances in the Record. See R. 23, 367.

At 10:30 o'clock that morning, Captain Rudan, the Master of the ship, (who had just returned from Galveston) ordered the thirteen striking members of the crew collectively and individually to "turn to", and they individually and collectively refused to do so (R. 23, 24, 435), Warren, the spokesman for the strikers, telling the Master that they were striking for union recognition and passes (R. 24).

After Captain Rudan had waited an hour to see if the strikers would obey his commands and return to work, he again ordered them to work (R. 162, 436), but the strikers still refused to perform their duties (R. 437). The Master then went ashore and brought aboard the local Deputy United States Shipping Commissioner, from Houston, who read the Shipping Articles to the crew and explained to them what their obligations were, namely, *inter alia*, "to be obedient to the lawful commands of the Master . . . and of their superior officers . . ." (R. 439).

Notwithstanding the orders of their superior officers and the warnings of the United States Shipping Commissioner, the thirteen striking seamen continued their strike and occupied the poop deck of the vessel during the rest of the day. The strike was terminated at about seven o'clock that evening after the petitioner's local attorney had promised to recommend to the petitioner that it issue passes to representatives of the N. M. U.[3] (R. 24, 25.)

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[3] The executive offices of the petitioner are located at Philadelphia. It is undisputed that no one at Houston had authority to make any agreement on behalf of petitioner permitting union delegates to board vessels, or recognizing any collective bargaining representative or waiving any misconduct of the crew in connection with the sit-down strike and their disobedience to orders of the vessel's officers.

The voyage was completed when the vessel arrived at Philadelphia, and on July 25, 1938, the employment of all of the ship's crew, including the thirteen strikers, was terminated by their "signing off" before the local United States Shipping Commissioner. (R. 685.)

After "signing off", Warren Pfuhl, Tracey, Ferguson, and Smith (five of the strikers) were informed by their superior officers that they would not be reshipped by the petitioner.[4]

When the other members of the crew learned that these five men would not be reshipped, seven more seamen [5] voluntarily left the ship and failed to "sign on" for another voyage.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

The petitioner intends to urge the following assigned errors:

1. Those errors relating to the question of the right of seamen who have signed and are serving on ship-board

[4] Petitioner has contended throughout these proceedings that the evidence adduced was insufficient to establish any custom or practice on the part of petitioner to vary the terms of the Shipping Articles and to hold that seamen when shipped by petitioner have a continuous tenure of employment as found under the evidence in *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 206 (1940). Moreover, other pertinent and relevant facts (in addition to the failure to establish a custom contradicting terms of the Shipping Articles) distinguish and differentiate this case from the *Waterman case.* See discussion infra on pages 28 to 32, inclusive of Brief.

[5] Crassavaz, the boatswain; Reeves, an able-bodied seaman; Lathan and Burns, ordinary seamen; Hughes, an oiler; and Neeley and Holt, wipers. Later, Crassavaz, voluntarily returned for employment and was "signed on" for a subsequent voyage.

under United States Shipping Articles to engage in a strike on board a steamship moored to a dock in a foreign [6] port, i. e., Question No. 1 in petitioner's Petition for Writ of Certiorari and errors of the National Labor Relations Board assigned in paragraphs 13, 14, 16, 19, 21, 22, 24, 25, 27, 28, 31 and 34 of Petition of Southern Steamship Company to United States Circuit Court of Appeals for the Third Circuit to Review and Set Aside Order of National Labor Relations Board. (R. 5 to 12 inc.)

2. Those errors relating to the question whether the employment of a seaman who has signed United States Shipping Articles for a particular coastwise voyage is terminated when he "signed off" at the end of said voyage, i. e., Question No. 2 in petitioner's Petition for Writ of Certiorari and errors of the National Labor Relations Board assigned in paragraphs 13, 14, 16, 18, 19, 21, 22, 26, 27, 28, 31 and 34 of Petition of Southern Steamship Company to United States Circuit Court of Appeals for the Third Circuit to Review and Set Aside Order of National Labor Relations Board. (R. 5 to 12 inc.)

3. Those errors relating to the question whether the right of an employer to have representatives present at an election to determine the employees' bargaining representative is dependent upon the consent of the labor organizations involved, i. e., Question No. 3 in petitioner's Petition for Writ of Certiorari and errors of the National Labor Relations Board assigned in paragraphs 13, 14, 16, 17, 19, 21, 22, 29, 30 and 34 of Petition of Southern Steamship Company to United States Circuit Court of Appeals for the Third Circuit to Review and Set Aside Order of National Labor Relations Board. (R. 5 to 12 inc.)

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[6] As contracted with home port. See the dissenting opinion of Circuit Judge Clark. (R. 781.)

QUESTIONS PRESENTED.

1. Do seamen who have signed and are serving on ship-board under United States Shipping Articles have the right to violate those articles by engaging in a strike on board the steamship moored to a dock in a foreign port?[7]

2. Where a seaman has signed United States Shipping Articles for a particular coastwise voyage and "signs off" at the end of said voyage, is his employment then terminated?

3. Did the National Labor Relations Board err in ruling that, "in the absence of consent of the labor organizations involved, company representatives should not be permitted to be present at elections to determine collective bargaining representatives"?

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[7] As contrasted with home port. See the dissenting opinion of Circuit Judge Clark. (R. 781.)

ARGUMENT.

SUMMARY OF ARGUMENT.

I. SEAMEN UNDER SHIPPING ARTICLES DO NOT HAVE THE RIGHT TO ENGAGE IN A STRIKE ON BOARD A VESSEL MOORED TO A DOCK IN A FOREIGN [8] PORT.

II. THE TENURE OF EMPLOYMENT OF A SEAMAN WHO HAS SIGNED SHIPPING ARTICLES FOR A PARTICULAR VOYAGE TERMINATES WHEN HE "SIGNS OFF" AT THE EXPIRATION OF THE SHIPPING ARTICLES UNLESS THE SEAMAN AFFIRMATIVELY ESTABLISHES A CUSTOM OR AGREEMENT TO THE CONTRARY.

III. THE RIGHT OF AN EMPLOYER TO HAVE REPRESENTATIVES PRESENT AT AN ELECTION TO DETERMINE EMPLOYEES' BARGAINING REPRESENTATIVE IS NOT DEPENDENT UPON THE CONSENT OF THE LABOR ORGANIZATIONS INVOLVED.

I. Seamen Under Shipping Articles Do Not Have the Right to Engage in a Strike on Board a Vessel Moored to a Dock in a Foreign [8] Port.

The backbone of a strong merchant marine is its personnel, and a strong, trained, efficient, and well-disciplined crew is far more important than any equipment on the vessel itself.

The maintenance of an efficient and well-disciplined crew is founded and dependent upon the unique relationship between the master of a vessel and his crew and is entirely different from that between employers and employees engaged in industry on shore. A seaman by signing shipping articles to a certain extent surrenders his personal liberty during the life of the maritime contract. He agrees, among other things, to perform all his duties

[8] As contrasted with home port. See the dissenting opinion of Circuit Judge Clark (R. 781).

diligently and to obey all the lawful commands of the master and other officers.[9] The safety of the ship and the lives of the officers and the crew as well as the success of the voyage require implicit obedience by the crew to orders of the captain. This has always been the law of the sea and is known by all who go down to the sea in ships.

> "However uneducated or inexperienced, seamen cannot but know, that they and the master on the deck of the vessel are not acting together in the same capacity, and like equals or citizens, adopting or opposing measures, by each one's taste, or by the popular vote, as at a town meeting; but acting together for a time, one with large powers, for the benefit of all, and the others without those powers, for the same benefit of all, and by the previous agreement of all." [10]

While this unique relationship requires, among other things, implicit obedience to the commands of the master, the welfare of the seaman has not been sacrificed for discipline, and the seaman is well protected. Congress has clothed the seaman with statutory safeguards [11] and the

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[9] The shipping articles provide, inter alia: "And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said Master, or of any person who shall lawfully succeed him, and of their superior officers, in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service to be duly performed the said Master hereby agrees to pay to the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the foregoing scale." (R. 681.)

[10] *United States v. Paterson*, 27 Fed. Case No. 16,037 at page 515, 517 (C. C. D. Mass. 1846).

[11] A majority of the crew may question the fitness of the vessel both in personnel and/or material. 46 U. S. C. A. §§ 653, 685.

seaman has always been regarded in legal proceedings as a ward of the admiralty.[12]

The articles are required to set forth a schedule for food and water. 46 U. S. C. A. § 713. See page 681 of the Record for the schedule in this case. Any three men may complain about the quantity and quality of either food or water. 46 U. S. C. A. § 662.

Vessels are also required to carry medicines and antiscorbutics; to provide one suit of woolen clothing on foreign voyages over fourteen days and to provide a safe and warm room for seamen on all voyages; to provide proper space and accommodations for the crew; and to maintain slop chests for sale of clothing to seamen. 46 U. S. C. A. §§ 666, 669, 80 and 670.

The requirements as to watches and the duties of the seamen are set forth in 46 U. S. C. A. § 673.

It would seem that these statutes express a policy to safeguard the seaman by restraining the power of the Master and subjecting the Master to penalties if he breaches any provision rather than to extend in any way the right of seamen to strike.

[12] See *Brown v. Lull*, 2 Sumner 443, 449 (C. C. Mass. 1836) in which Mr. Justice Story describes seamen as "a class of persons remarkable for their rashness, thoughtlessness and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their value. They combine, in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity, which is easily won, and confidence, which is readily surprised. Hence it is, that bargains between them and shipowners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; for they involve great inequality of knowledge, and forecast, of power, and of condition. Courts of Admiralty on this account are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been, by a somewhat bold figure, often said to be favorites of Courts of Admiralty. In a just sense they are so, so far as the maintenance of their rights, and the protection of their interests against the effects of the superior

The special relationship between the master and the crew has not materially changed notwithstanding the vast changes in the industrial pursuits on shore. Despite recent inventions, improved methods of communications, increased speed in operation and transportation, a ship still remains a world all of its own, and, when at sea, there is no power which can instantly be called upon to aid in any emergency. The position of a master of a vessel is not parallel to the superintendent of an industrial plant, and his responsibilities for the vessel, her cargo, and the safety of her passengers and crew are great. Without obedience from his crew, the master's position would be intolerable, and he would not be able to administer his trust with any degree of safety. Seamen, therefore, should not be permitted to resist the commands of the master in port any more than at sea, for to permit the former would encourage disobedience elsewhere.

When a man puts foot on the deck of a ship, he becomes part of a disciplined organization subject to the navigation laws of the United States. He should know that during the term of that voyage he will be required to give up his freedom both while the vessel is at sea and while at any port of call and that during that time he will be subject to all orders of the master. While the government of the United States has extended to seamen greater rights than those enjoyed by seamen of any other nation and has

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skill and shrewdness of masters and owners of ships are concerned."

This reasoned statement why seamen are considered "wards of the admiralty" likewise shows clearly one of the reasons why it is all the more necessary to maintain discipline on a vessel *at all times*. See also *Benedict on Admiralty* (6th Ed. 1940) § 621; *Robinson on Admiralty* (1939) p. 283.

imposed lighter compulsory duties, these rights do not include the right to strike while on a voyage. On the contrary, the liberal provisions enacted for the benefit of seamen and the benevolent attitude of our courts call for greater loyalty on the part of our seamen to obey the laws of our government and, more particularly, to obey the lawful commands of the master of the vessel.

The right to strike as granted to employees under the National Labor Relations Act does not apply to seamen on board a vessel in a foreign port. As stated in *Rees v. United States*, 95 F. (2d) 784, 792 (C. C. A. 4th 1938) "the nature of their calling . . . imposes upon them obligations not common to shore occupations," and their duty to obey the lawful commands of their master is superior to any right to strike. While the task in this case, as is so frequently the task in cases in litigation, "is to reconcile two rights in order to prevent either from destroying the other",[13] we submit that the right to strike is not superior to the maritime law. Moreover, no one can arbitrarily say that the right to strike must never be curtailed. Various types of strikes have long been forbidden in Britain, and British labor has not found itself in servitude.

The strike now under review by this Court was in the nature of a "sit-down" strike and occurred as follows.

The members of the crew of petitioner's steamship *City of Fort Worth* on June 30, 1938, signed Shipping Articles before a local United States Shipping Commissioner for a coastwise voyage from Philadelphia to Houston and other ports and return wherein they agreed, *inter alia*, to perform their duties and to obey the commands of their superior officers. (R. 681, 683.)

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[13] Opinion of Mr. Justice Frankfurter in *Minersville School District v. Gobitis*, 310 U. S. 586 at 594 (1940).

On Sunday, July 17, 1938, while ashore at Houston, not the home port, thirteen members of the crew decided to strike because the petitioner had not recognized the N. M. U. for purposes of collective bargaining and had refused passes on board its vessels for such representatives. (R. 23, 129.)

The following day, Monday, July 18, 1938, at about 8 a. m., the thirteen members of the crew, consisting of the boatswain, seamen, firemen, oilers, wipers, and the mess boy, staged a "sit-down" strike on board the vessel. This strike continued the entire day.

The men in the engine department refused to tend to fires and to turn steam on deck for the loading of cargo, while the men in the deck division refused to perform their duties. All of the strikers gathered together on the poop deck of the ship which place they occupied during the entire strike.

The Master ordered these seamen to perform their various duties both at 10:30 a. m. and at 11:30 a. m. (R. 24, 162, 435) and the First Officer, the Chief Engineer and the Steward likewise ordered the seamen under them to "turn to" (R. 272, 273, 380, 381, 408). The United States Shipping Commissioner was brought aboard by the Master, and he read to these strikers the Shipping Articles which they had signed and warned them of the consequences of their disobedience (R. 24, 437-440). Notwithstanding these orders and warnings, the strikers repeatedly refused to return to work but continued to occupy and possess the poop deck until seven o'clock that night when the strike was adjusted (R. 25, 137, 274).

The testimony shows that the strikers themselves considered the strike to be what is commonly known as a "sit-down" strike which was deliberately staged notwithstand-

ing possible danger to the vessel while moored to the dock. Although no damage was occasioned, serious consequences might have resulted from these acts. The officers were required to assist the six men of the crew who did not strike in the care of the fires and the loading of the cargo during the entire day of Monday, July 18, 1941. The evidence showed that without fires it would have been impossible to have maintained the necessary steam pressure for loading and to have maintained adequate fire protection for the ship. (R. 354.) Notwithstanding these known dangers, the strikers wilfully refused to perform their duties, took possession of the poop deck of the *SS. City of Fort Worth*, and were a law unto themselves for eleven hours. "Sit-down" strikes are unlawful, and an employer may refuse to retain in his employ those who illegally take and hold possession of his property. *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939).

The unlawfulness of the strike in this case acquired a peculiar significance different from that of strikes on land not only because of the unique relationship between the seamen and their employer but also because of the fact that the strike occurred on board the vessel while she was moored to a dock in a foreign [14] port.

The Court below in its majority opinion realized that "the question of the right of seamen to strike under the circumstances" in this case "is still an open one" (R. 777) but drew an artificial distinction between a strike in a foreign [14] port and a strike in a domestic port.[15]

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[14] As distinguished from home port. See dissenting opinion of Circuit Judge Clark (R. 781).

[15] "Upon reason, however, we think that there is no sound basis for depriving seamen of this right when, as here, their vessel is moored to the dock in a *safe domestic port*. Whether the right exists in a foreign port we need not now decide." (R. 777.) (Italics ours.)

Circuit Judge Clark recognized the fallacy of this reasoning when he said in his dissenting opinion:

> "To bottom a general whitewash upon that fact overlooks, in my opinion, the very essence of maritime traffic. Such essence, here, as in the air, is the 'happy landing', the safe return of the vessel from its voyage." (R. 784.)

The Court-below apparently conceded that the strike would have been unlawful if the ship had been at sea and, by inference (although it refused to decide), if the ship were in the port of a foreign power, but held that the strike was lawful in a port of the United States. These classifications represent distinctions without any basic differences. In each case the authority of the master is flaunted, and safety of the ship is jeopardized, notwithstanding the erroneous conclusion of the Court-below that the necessity for the master to be able to exercise his power over the crew is largely gone "when his vessel is safely in port" (R. 777).

In those cases where seamen who have engaged in strikes on board vessels during a voyage and have been found guilty of revolt and mutiny, the courts have not made any distinction between disobedience of sailors at sea and in port.[16]

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[16] *United States v. Smith*, 27 Fed. Cas. No. 16,344 (C. C. D. Pa. 1811) (Revolt while vessel lying in river about one and one-half mile below St. Ubes, within the bar); *United States v. Hamilton*, 26 Fed. Cas. No. 15,291 (C. C. D. Mass. 1818) (Revolt while vessel at Salem harbor); *United States v. Keefe*, 26 Fed. Cas. No. 15,509 (C. C. D. Mass. 1824) (Attempt to commit revolt on American vessel in foreign port); *United States v. Gardner*, 25 Fed. Cas. No. 15,188 (C. C. D. Mass. 1829) (Revolt in Boston harbor prior to sailing); *United States v. Haines*, 26 Fed. Cas. No. 15,275 (C. C. D. Mass. 1829) (Revolt in outer harbor of

In *United States v. Staly*, 27 Fed. Cas. No. 16,374 (C. C. D. R. I. 1846) the doctrine that there can be no mutiny in a safe harbor was rejected with the following comment on page 1290:

> "If obedience can be required on a vessel on the high seas, at a distance from the river, it should be in the river, or at anchor and before the clearance is obtained as well as after, or all order will be frustrated, and the due navigation and safety of the vessel rendered impossible. U. S. v. Hamilton [Case No. 15,291]; U. S. v. Stevens [Id. 16,394]. If there be anything in the objection, it applies to the jurisdiction of this court to try the offence, when committed within the stream and port, and not on the high seas, rather than to the offence itself not having been committed at all."

Boston ready to proceed to sea); *United States v. Cassedy*, 25 Fed. Cas. No. 14,745 (C. C. D. Mass. 1837) (Revolt in St. Helena while on whaling voyage in Pacific); *United States v. Roberts*, 27 Fed. Cas. No. 16,173 (C. C. S. D. N. Y. 1843) (Revolt on board American vessel lying in port of Havre, France, in an enclosed dock into which tide was let at will. The offense had not been tried in French courts); *United States v. Staly*, 27 Fed. Cas. No. 16,374 (C. C. D. R. I. 1846) (Endeavor to make revolt in Providence River before ship had "cleared" on her voyage); *United States v. Paterson*, 27 Fed. Cas. No. 16,037 (C. C. D. Mass. 1846) (Revolt on high sea on trip from New Orleans to Boston); *United States v. Seagrist*, 27 Fed. Cas. No. 16,245 (C. C. S. D. N. Y. 1860) (Endeavor to make revolt on American vessel lying in Port of Palmero, Sicily, and fastened to shore by cables but communicating with land by her boats); *Hamilton v. United States*, 268 Fed. 15 (C. C. A. 4th, 1920) (Revolt in Port of Hamilton, Bermuda); *Rees v. United States*, 95 F. (2d) 784 (C. C. A. 4th, 1938) (Sit-down strike in harbor of Montevideo, Uruguay); *United States v. Albers*, 115 F. (2d) 833 (C. C. A. 2d, 1940) (Sit-down strike in harbor of Colombo, Ceylon).

The statutes defining revolt and mutiny state that such offenses can be committed on a vessel "on the high seas, or on any other waters within the admiralty and maritime

The two most recent cases involving mutiny likewise made no distinction between whether the strike occurred in an "unsafe" port as distinguished from a "safe" port or in a "foreign" port as distinguished from the "home" port.

In *Rees v. United States*, 95 F. (2d) 784 (C. C. A. 4th 1938) the crew of the *SS. Algic*, while anchored in the harbor of Montevideo, Uruguay, staged a "sit-down" strike on board the vessel when they learned that a stevedore strike was in progress on shore and the vessel was being loaded by "scab" stevedores or strikebreakers. In that case, the American Consul came aboard the vessel and advised them that their actions were contrary to law. Late that afternoon, when the Captain threatened to put them in irons, they returned to work, but a delay of twenty-four hours had been sustained. Upon return to Baltimore, the crew was indicted and found guilty. The Court held that the acts of the seamen amounted to a usurpation of the command of the vessel and their refusal to obey orders was a violation of their duty as seamen, saying on page 792, that "the defendants, under the circumstances shown by the evidence, had no right to strike, and the trial judge was right in so instructing the jury."

In *United States v. Albers*, 115 F. (2d) 833 (C. C. A. 2d 1940) the crew staged a "sit-down" strike on the after deck of the *SS. Exca* while the vessel was at anchor at the harbor of Colombo, Island of Ceylon. They refused to do any work, contending that their articles had been broken when the master on the previous afternoon had refused a

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jurisdiction of the United States," 18 U. S. C. A. §§ 483-484. This includes all domestic harbors. The piracy statute provides that piracy can be committed only "on the high seas", 18 U. S. C. A. § 481. The distinction between the places where these offenses may be committed is significant.

"draw" of wages, although the Master had computed the amount of each man's draw later during the previous day and offered the draw to them early the following morning before the strike. The Court held that the Master was entitled to a reasonable time to meet the demand (although the Master did not ask for time) and that the demand must be made in good faith. The Court refused to decide whether the Master's refusal of the "draw" was vitiated by the prompt retraction accompanied by an offer to make the requested payment but held that the demand was not made in good faith. If the Master's refusal was a breach of the Shipping Articles and so considered by the crew, they should not have stayed on the ship. Remaining on board, the seamen showed that they considered "the refusal of their demand for pay as ending the shipping articles was a nullity". Circuit Judge Swan further very succinctly stated on page 836:

> "It would be an utterly intolerable construction of the statute that would permit seamen to remain on board, occupying the quarters of the crew and eating at the ship's expense, and yet freed from the duty to work or obey orders of the master."

Our Courts in civil suits involving labor disputes have likewise refused to sanction strikes on board vessels.

In *Peninsular & Occidental Steamship Co. v. National Labor Relations Board,* 98 F. (2d) 411 (C. C. A. 5th 1938), a delegate of the C. I. O. had been refused permission to board the vessel. Two of the crew who wanted to change union affiliation to the C. I. O., refused to work, staged a sit-down strike, refused to let the electrical equipment be used, with the result that the ship was prevented from sailing. The strike was then settled through intervention. Charges were filed with the Labor Board when the owners

of the vessel later took crews from the A. F. of L. union under a preferential contract which did not include members of the crew who had engaged in the sit-down strike. The order of the National Labor Relations Board, ordering reinstatement, was annulled by the Circuit Court of Appeals which said (pp. 414-415):

> "The owners of vessels, their masters and other officers, are required to exercise the highest degree of care and skill for the preservation of the lives of passengers and crews and to safely transport the cargo. This duty is superior to all other considerations in the operation of ships. Implicit obedience to the lawful orders of the master is required on a vessel. Without that there would be no safety. Engaging in sit-down strikes and taking possession of the ships, in defiance of their officers, was at least prima facie evidence that the crews were guilty of mutiny. 18 U. S. C. A. § 483. Hamilton v. U. S., 4 Cir., 268 F. 15, certiorari denied 254 U. S. 645, 41 S. Ct. 15, 65 L. Ed. 454. It is true these strikes had been settled without charges being made against the men but their actions in that respect would form a basis for considering their future attitude. A ship that is not manned by a competent crew is unseaworthy."

Petition for certiorari was denied in *National Labor Relations Board v. Peninsular & Occidental Steamship Co.*, 305 U. S. 653 (1938).

In *The Oakmar*, 20 F. Supp. 650 (D. C. Md. 1937) and in *The Losmar*, 20 F. Supp. 887 (D. C. Md. 1937) the owners filed possessory libels for the above vessels. The crews in each case had taken complete possession of each vessel, claiming a right to coerce the owner into establishing a higher scale of wages for members of the union to which they belonged. The Court in each case held that the crew was not entitled to remain on their respective vessels under

a sympathetic strike. In *The Oakmar, supra,* the Court directed the marshal to restore complete possession of the vessel to the owners. In *The Losmar, supra,* the crew voluntarily left the ship before a hearing was held on the order to show cause. However, in each case, Judge Coleman clearly and forcibly showed that the crew is not entitled to use illegal means, such as a sit-down strike, to arrive at an end which might have been reached by appropriate legal action.

The Court-below erred in holding that the right of seamen to strike on board a vessel *under circumstances present in this case* can be inferred from the two cases of *Weisthoff v. American-Hawaiian S. S. Co.,* 79 F. (2d) 124 (C. C. A. 2nd, 1935) cert. den. 296 U. S. 619 (1935) and *Black Diamond S. S. Corp. v. National Labor Relations Board,* 94 F. (2d) 875 (C. C. A. 2nd, 1938) cert. den. 304 U. S. 579 (1938).

In *Weisthoff v. American-Hawaiian S. S. Co., supra,* the former members of the crew of the *SS. Texan* filed a libel for wages. The crew had signed on at San Francisco for a voyage to Gulf and Atlantic ports and return. While at New York they struck for three watches, for pay under the 1929 Shipping Board wage scales, for the settlement of the West Coast dock strike, etc. They would not leave the ship until police were called aboard, and then they demanded their wages. The *SS. Texan* sailed that night with a new crew. The Court held that the statutory regulations concerning watches [17] had been broken *on the voyage* and that the seamen were entitled to their discharge on demand and to be paid their wages earned. The owners contended that the seamen's wages had been forfeited by the endeavor

[17] 46 USCA § 673.

to revolt. The Court rejected this defense saying that the contention was not sustained and that it did "not find more than the making of demands, some of which were ill-advised and called for action they should have known the master could not take, instead of putting their case to him on tenable statutory grounds which entitled them to their discharge and pay. It was rather a case of poor judgment and misunderstanding of their rights than the gross misconduct which will forfeit wages." [18]

This case nowhere implies that a strike on board a vessel is legal or may not constitute a mutiny, and the conclusion of the Court below and of some authors of legal articles [19] is erroneous and without foundation. The *Weisthoff case* goes no further than to hold that the breach by the master of his statutory duty entitled the crew to their wages and discharge, that their obligations as seamen had ceased, and that their right to wages had not been forfeited because they made demands on the wrong theory. Nowhere in the case is there an implication that a strike on board ship is of itself legal and nowhere is there any reference to "danger to the ship" or "safe harbor" or "home port." [20]

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[18] Ibid. at 125.

[19] Rothschild, *The Legal Implications of a Strike by Seamen*, 45 YALE L. J. 1181, 1191 (1936); Sapiro and Frank, *Mutiny at the Dock*, 25 CAL. L. REV. 41, 51 (1936); Labor Law—Right of Seamen to Strike, 37 COL. L. REV. 1294, 1295 (1938); *SS. Algic*, 1. NAT. LAWYERS GUILD Q. 144, 149 (1938). *Contra:* Labor Disputes in the Merchant Marine, Note 28 VIRGINIA L. REV. 79 (1941); Sit-down Strike on Shipboard, Note 23 CORNELL L. Q. 302 (1938); Seamen-Mutiny-Sit-down Strikes, Note 18 ORE. L. REV. 128, 136 (1938); Labor Law-Seamen-Reinstatement of Sit-down Strikers, 40 MICH. L. REV. 468 (1942).

[20] Compare the decision in the *Weisthoff case* with the more recent decision of the same court in the case of *United States v. Alber, supra*, where it was held that the breach of

Black Diamond S. S. Co. v. National Labor Relations Board, supra, is even less applicable. In that case there was no strike *on board* the vessel but the engineers voluntarily left their ships prior to sailings.

We submit that both upon authority and upon reason seamen do not have the right to engage in a strike on board a vessel moored to a dock in a foreign [21] port. The distinction between the home port and a "safe domestic" port is a real one.

The offices of the owners are usually at the home port, as is so in this case. When the vessel is docked in another port, either domestic or foreign, it is often difficult and at times impossible to communicate with anyone in authority in the case of any emergency. In this case, as in many other instances, it is quite possible that the Master of the vessel could more easily communicate with his superiors if in a port of a foreign nation, i. e., any of the eastern ports of Canada, than in a distant port of this country, i. e., the Gulf ports or the ports of our West coast.

When in any foreign [21] port the vessel is subjected to many hazards, even when moored to a dock, and the artificial distinction between ports seems to ignore the unique and peculiar relationship between the Master and his crew, and the statutory requirements imposed on the seamen as well as the Master. Discipline must be maintained at all times, and it is as imperative when the vessel is moored to a dock as when the vessel is on the high seas. Can it be said that a modern ship, with all its complicated mechanism

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a statutory duty (if there was a breach) did not permit the crew to remain on the vessel and refuse to work. *Supra* at pages 18 and 19.

[21] As contrasted with home port. See the dissenting opinion of Circuit Judge Clark (R. 781).

requiring constant attendance and vigilance against numerous risks, and with valuable stores and cargoes as well as officers, crew, and passengers is ever "safe" in any port or at sea unless manned by a competent and disciplined crew.

The supremacy of our maritime laws when in conflict with the National Labor Relations Act was recognized not only in the case of *Peninsular & Occidental Steamship Co. v. National Labor Relations Board, supra*, but also recently in the case of *Texas Company v. National Labor Relations Board*, 120 F. (2d) 186 (C. C. A. 9th, 1941) in which the Master's discharge of his boatswain for habitual drunkenness was upheld. In that case the Court held that the Board (which ordered re-employment) had ignored during the entire proceeding "the long established Congressional legislation for the protection of life at sea" and had misconceived "the powers of a ship's officers and managers necessary in such protection" and that the Board had erred "in failing to recognize that these maritime safety laws are paramount to the National Labor Relations Act . . . wherever the Board's proposed orders may increase the danger which the long established safety legislation of Congress seeks to prevent or lessen."

> "The duties and obligations of the master of the ship in making up and controlling his crew cannot be determined by the study of the management of, say, a great automobile factory. . . .
>
> "The master must have the power to compel the services of such men for the safety of all on board." *Texas Company v. National Labor Relations Board, supra*, at page 187.

This is all the more so when some of the strikers (like Warren, who was their spokesman, and Crassavaz, who was

the boatswain) occupy some position of authority such as a spokesman or as an under-officer of a ship.

> "The men elected to represent the crew or a part of it, can make or break the discipline necessary in the vessel's navigation and management for the safety of everyone on board." *Texas Company v. National Labor Relations Board, supra,* at page 189.

The ultimate safety of a vessel requires discipline at all times wheresoever the ship may be—whether in port or at sea. See 40 MICH. L. REV. 468 at 470 (1942).

> "To advocate strikes on board a ship at its pier merely on the basis that, in such circumstances, the safety of lives and cargo is not endangered, is to take a short-sighted point of view. No doubt, while a vessel is in port, the immediate security of all concerned is not greatly jeopardized by the crew's refusal to do its duty. But it is not alone the immediate safety or the present security which must be considered. There is an ultimate safety which must be protected. For this there must be discipline at all times, whether the ship be at sea or tied to shore in the safest of harbors. A master who cannot control his crew in port is not likely to be able to control it at sea. To allow the seamen to resist lawful commands in one place is but to encourage similar resistance elsewhere." [22]

The Department of Commerce which is primarily concerned with the safety of American vessels, still considers lack of discipline the main cause of unsafety. See the Maritime Commission report, Economic Survey of the American Merchant Marine, p. 43, H. Doc. No. 392, 75th Cong., 2nd sess. (1937).

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[22] Sit-down Strike on Shipboard, Note 23 Cornell Law Quarterly, 302, 306-307 (1938).

From time immemorial the master of the ship has been in supreme command. The reason for this authority is obvious and well known to the layman as well as to the seaman. To permit seamen to strike under circumstances like those in the instant case would result in a complete breakdown and demoralization of the responsibility for life and property aboard a ship. Seamen from earliest days have known that the master is the final authority on board his vessel. The law which permits strikes on land cannot possibly be held applicable to those who go down to the sea in ships. If seamen who feel they are aggrieved are permitted to flout the authority of their master by refusing to obey his lawful commands and then engaging in a strike, the law of the sea, so far as responsibility of the master and crew are concerned, would be revolutionized. The far-reaching effects of such a revolutionary change are obvious.

There must be a different law for strikes on ships and those on land. The seaman must be made to reaffirm that which he has always known and understood, namely, to obey the Master's lawful commands or suffer the consequences for disobedience.

These are times of great emergencies when the safety as well as welfare of our country is at stake. We are presently fighting for our very existence. Our fighting ships—represented by the Navy—and our Merchant Marine—represented by such ships as the *S. S. City of Fort Worth*—have their very material part to play in our nation's present safety and security as well as its future.

Many young men while not enlisting in the armed forces of our country are now receiving instruction through the Maritime Commission and learning the essentials of sea duty. They will man the merchant vessels which this country has been and will be building for maintenance of its

supply lines and its existence. These seamen, while not in the fighting forces, will be performing a vital service in our nation's present campaign equal in importance to that of enlisted men. The present emergency is not only a matter of ships, planes, and equipment; it is also one of properly trained and properly disciplined men. American seamen, conscious of their full duties and obligations, are equally necessary to our defense. If seamen are permitted to strike under conditions similar to those in the instant case, we will be taking a decided step backward. We will be officially sanctioning disobedience and lack of discipline upon our merchant marine. In short, we will be jeopardizing the present and future safety of our country.

II. The Tenure of Employment of a Seaman Who Has Signed Shipping Articles for a Particular Voyage Terminates When He "Signs Off" at the Expiration of the Shipping Articles Unless the Seaman Affirmatively Establishes a Custom or Agreement to the Contrary.

The Shipping Articles which are required of the Master and his crew constitute the sole memorial of the crew's contract of employment.[23] They are full and complete in themselves, and, generally speaking, are more for the protection of the seamen than for the Master and the owner.

The Shipping Articles detail, inter alia, the nature and extent of the voyage to be undertaken, the extent of said employment, the wages to be received, the capacity in which the various members of the crew are to serve, the provisions to be allotted to the crew during the voyage and contain a covenant by the crew to perform their duties and to obey their officers. In addition, space is provided for the

[23] Revised Statutes § 4520; 46 U. S. C. A. § 574.

insertion of any additional stipulation to which the parties may agree in connection with this contract of employment (R 681).

Shipping Articles were signed by all the officers and members of the crew of the *S. S. City of Fort Worth* on June 30, 1938 for a voyage from Philadelphia to Houston and return. They were signed at Philadelphia before the local United States Deputy Shipping Commissioner and show that the contract of employment was for that particular voyage. Said articles were introduced into evidence (R. 360-362) and a reproduction of said articles appears in the record (R. 681-689).

When the *S. S. City of Fort Worth* completed her voyage at the Port of Philadelphia on July 25, 1938, all of the crew were "signed off" (R. 685). However, after "signing off", Seamen Warren and Pfuhl, Oiler Tracey, Fireman Ferguson, and Mess Boy Smith were informed by their superior officers that they would not be reshipped. After the other members of the crew learned that the aforesaid five men would not be reshipped, seven more men voluntarily left the ship and failed to "sign on" for another voyage. These men were Boatswain Crassavaz, Seamen Reeves, Lathan and Burns, Oiler Hughes and Wipers Neeley and Holt.[24]

The Board, which ordered reinstatement of the aforesaid men, found that the tenure of employment of the seamen was "not terminated by the mere expiration of shipping articles" and "that on July 25, 1938 the employment

[24] Subsequently, Boatswain Crassavaz returned for employment and was "signed on" by petitioner for a subsequent voyage. There is no evidence, whatsoever, to indicate that the six other members of the crew, who voluntarily decided not to sign on, ever endeavored to return to the employment of petitioner.

of the five men named in the complaint did not automatically terminate" (R. 27, 28). This finding was affirmed by the Court-below (R. 773). Both the Board and the Court-below relied on the recent case of *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 206 (1940), as authority for this mixed finding of fact and conclusion law.

The evidence in this case demands a contrary conclusion.

The burden was upon the seamen to prove that the terms of employment embodied in the Shipping Articles had been modified, but they failed to meet this burden. The evidence in this case was not sufficient to support any finding that their contracts of employment were subject to such a custom or practice.

The only custom established by the evidence was that a seaman could consider he was reëmployed on the next voyage, if new shipping articles were not immediately signed and he had not heard anything to the contrary from his officers.

First Officer Helland testified that it was the *custom* of the petitioner to tell the seamen when they were paid off whether or not petitioner desired them to continue to work on the vessel and to make the next trip. This was usually accomplished by re-signing the men who were to be reëmployed at the time they "signed off" from the previous voyage, and by telling at that time those seamen whom petitioner did not want to reship that their future services would not be desired. (R. 300, 301.)

The only other testimony concerning a practice or custom was that of four of the five seamen who had not been offered reëmployment. Their testimony only related to what their status had been during the several times when

they had not immediately signed new articles but had not received any instructions from their officers concerning further employment (R. 154, 184, 185, 200, 221, 222). Moreover, in those instances the seamen actually continued at work on the ship in the intervals between their signing off and signing new shipping articles and were paid for such work.

Tracey had only been employed by petitioner for a period of sixteen months. He testified that he usually signed articles for another voyage at the same time as he signed off the last voyage, but that on three or four times he had not signed the new articles until two or three days later (R. 154), on which occasions he continued to work for the company and was paid (R. 154).

Ferguson worked for the company about one year, and he testified that he had always signed on the same time that he signed off except on one occasion when the vessel was in drydock for three or four days during which period he was paid for work aboard the ship (R. 184, 185).

Smith had testified that he made twenty-five trips and on five occasions did not sign on immediately but worked and was paid during the intervening time of two or three days (R. 200).

Pfuhl, who had taken ten trips, testified that on one occasion he had not signed on immediately as the vessel at that time went into drydock for seven days during which time he worked for the company and was paid for his routine work (R. 221, 222).

Warren did not testify.

Thus, it is apparent that the record in this case is without any substantial evidence to support a finding that it was the custom of petitioner to consider that its seamen were under a tenure of continuous employment notwith-

standing they had executed Shipping Articles for a specific voyage.

An examination of the facts in the case of *National Labor Relations Board v. Waterman Steamship Corp., supra,* will show that said case was decided on its particular and peculiar facts which are entirely different from the facts in the instant case.

In the *Waterman case, supra,* when the vessels *SS. Bienville* and *SS. Fairland* had completed their respective voyages to Europe and the West Indies, they were laid up for dry-docking and repairs, and the entire unlicensed crew and first steward of the *SS. Bienville* and all but three of the crew of the *SS. Fairland* were discharged by the respondent company. In that case Your Honorable Court examined an extensive record concerning the custom and practice of the Waterman Steamship Company. This testimony came not only from officers and members of the crew but also from executives of the steamship company, covering a period as far back as 1924. As expressed by Mr. Justice Black, the numerous men who testified "had in various capacities followed the sea in the aggregate for a hundred years.[25]

The evidence in this case shows a factual situation so different from that in the *Waterman case* that the Board and the Court-below erred in finding that the seamen in the instant case had a continuous tenure of employment on the authority of the *Waterman case.*

It does not follow that *all* steamship companies have modified their Shipping Articles merely because one particular company has done so. The modification must be proved in each case by substantial evidence. The practice

[25] *National Labor Relations Board v. Waterman Steamship Corp., supra* at page 218.

of various steamship companies in the employment of their crews and the manning of their vessels varies in accordance with the needs, customs and practices of each particular company. It is well known that the shift in the personnel of a ship's unlicensed crew is very large and that seamen tend to move from one vessel to another depending upon many factors,—their desire to visit other ports, to be with other seamen, and generally to make a change. When seamen sign the articles for a specific voyage, they contemplate making that voyage and not necessarily being thereafter engaged in a continuing employment after the completion of the voyage, and steamship companies generally understand that their seamen are employed on the basis of a particular voyage and not under a continuing contract of employment.

We submit that in this case the relationship of employer and employee had automatically terminated at the port of discharge. *The Velma L. Hamlin,* 40 F. (2d) 852 (C. C. A. 4th, 1930). Petitioner was under no obligation to reëmploy any seaman at the expiration of his articles, unless petitioner desired to do so.

III. The Right of an Employer to Have Representatives Present at an election to Determine Employees' Bargaining Representative Is Not Dependent Upon the Consent of the Labor Organizations Involved.

The Board's order found that petitioner was guilty of an unfair labor practice in refusing to enter into collective bargaining with the N. M. U. This finding was based upon the Board's finding that its certification of the N. M. U. as the exclusive bargaining agency was valid. By stipulation entered into between the Board and petitioner the va-

lidity of this certification is dependent upon the correctness of the Board's ruling that "in the absence of consent by the labor organizations involved, company representatives should not be permitted to be present at elections to determine collective bargaining representatives." (R. 114.)

The proper conduct of any election requires that the parties affected by the election be entitled to have observers at the election to identify voters and to see that the balloting is fairly conducted. This right is fundamental to all elections and to make elections under the National Labor Relations Act an exception would be denying the employer a fair hearing and would violate the Fifth Amendment to the Constitution of the United States, notwithstanding the decision in *Marlin-Rockwell Corporation v. National Labor Relations Board,* 116 F. (2d) 586 (C. C. A. 2d, 1941), cert. den., 313 U. S. 594 (1941). Petitioner should have had an opportunity to challenge the right of those whom it might have thought ineligible to vote and to defend the right of those whose vote might have been challenged by other parties present. Furthermore, the petitioner has no means of knowing and does not know whether or not the persons who voted under the names appearing on petitioner's payroll were actually the same persons then employed by petitioner. The opportunities for fraud and mistakes in the conduct of the election are obvious; the equally obvious means of guarding against them were rejected by the Board.

CONCLUSION.

We, therefore, submit that petitioner was not guilty of any unfair labor practice and should not be required to reinstate or pay back pay to any of the five members of the crew to whom petitioner had decided not to offer reemployment or to any of the six members of the crew who

voluntarily went on a "sympathy" strike and that the petitioner should not be required to bargain with N. M. U.

The seamen, having signed Shipping Articles for a specific voyage, had no right to engage in a "sit-down" strike on board the *SS. City of Fort Worth* while docked at the Port of Houston during said voyage and, irrespective of said "sit-down" strike, the seamen's employment was terminated at the end of said voyage.

The decree of the Circuit Court of Appeals for the Third Circuit, granting enforcement of the order of the Board, should be reversed and the findings, conclusions, decision and order of the Board should be in all respects vacated, annulled, and set aside.

Respectfully submitted,

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